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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2004

JERRY REGIER, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether enhancement of the lodestar amount of an attorney's fee award under 42 U.S.C. s. 1988 requires specific findings based on evidence of record that 1) the lodestar amount is unreasonable; 2) any factor relied upon to enhance the lodestar amount is necessary to obtain a reasonable fee; and 3) the degree of enhancement is necessary to obtain a reasonable fee.

2. Whether the record supports the district court's conclusion that this case was so "rare" and "exceptional" as to justify doubling the lodestar fee amount.

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Petitioner-defendants: Jerry Regier, Secretary of the Florida Department of Children and Families; Mary Ellen McDonald, District 11 administrator, Florida Department of Children and Families; Michelle Brantley, Assistant Secretary, Florida Department of Children and Families; and Robert Sharpe, Medicaid Director, Florida Agency for Health Care Administration.

Respondent-plaintiffs: the respondents appeared anonymously below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, executive branch officials of the State of Florida, respectfully petition the Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The court of appeals' opinion is unreported. It is reproduced at petitioners' appendix A. The district court's fee judgment is unreported. It is reproduced at petitioners' appendix B.

JURISDICTION

The court of appeals rendered its decision on January 16, 2004. Pet. App. A. This Court has jurisdiction under 28 U.S.C. s. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S. Code section 1988 states:

Proceedings in vindication of civil rights

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS

§§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF THE CASE

The petitioners request the Court to review an order awarding plaintiffs in a civil rights action $649,869.50 in attorneys' fees. This amount was twice the lodestar. The issue is whether the district court applied the proper standards in enhancing an attorneys' fee lodestar.

This action was filed in March 1992 by 13 anonymous Medicaid-eligible individuals with developmental disabilities. The lawsuit was an attack on waiting lists for placement in intermediate care facilities for the developmentally disabled (ICF/DDs). ICF/DDs are residential treatment facilities that provide 24-hour care and services to severely disabled

individuals with developmental disabilities. *Doe 1-13 v. Bush*, 261 F.3d 1037 (11th Cir. 2001) (*Does II*). ICF/DDs are funded through the joint federal-state Medicaid program. *Id.* The respondents contended that they were not being provided ICF/DD services with "reasonable promptness," as required by 42 U.S.C. s. 1396a(a)(8) and the Fourteenth Amendment to the Constitution. *Doe v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) (*Does I*). The petitioners are officials of the Florida Department of Children and Families and the Agency for Health Care Administration, the two state agencies charged with administering ICF/DDs and Medicaid.

The plaintiffs obtained a summary judgment and injunctive relief, which was upheld on appeal. *Does I.* The relief they obtained was that sought in the complaint. They later sought contempt for alleged violations of the judgment, but the Eleventh Circuit overturned a trial court order finding the defendants in contempt. *Does II.*

The plaintiffs moved for attorneys' fees and costs in September 1999, seeking fees of $339,950.50 for 1193.5 hours of attorney time, 736.8 hours for a "Sr. Partner" at $350/hour, 107.4 hours for a "Jr. Partner" at $195/hour, and 349.3 hours for "Associates" at $175/hour. The plaintiffs requested a 2.0 modifier, which brought their total fee request to $679,901. The defendants filed specific, line-by-line objections to the requested fees and costs.

In March 1999, the plaintiffs filed a supplemental fees and costs motion, seeking additional compensation for 183 hours of trial court work. Total fees in this request came to $94,650, an amount twice the proposed lodestar.

Finally, the plaintiffs sought fees for work on the merits appeal. They claimed $85,304.50 ($170,325 with a 2.0 multiplier), reflecting 311.5 hours -- 158.75 hours for the "Sr. Partner" at $350/hour, 152.10 hours for the "Jr. Partner" at $195/hour, and .5 hours for "Associates" at $175/hour. Again, the defendants filed detailed, line-by-line objections, both to the supplemental request and the appellate fees and costs.

Shortly after the court of appeals issued the mandate on the contempt appeal, the trial court entered an initial order awarding fees and costs. The court awarded fees of $430,156.25 on the initial and supplemental fee motions. In doing so it applied a 2.0 multiplier, denying every single defense objection. However, the court awarded no costs and said nothing about appellate fees.

The plaintiffs' objected to the order and moved for clarification. The district court then entered the order on review. Pet.App. 2. First, the trial court reduced hourly rates for work in the trial court from those requested by the plaintiffs. Although the plaintiffs asked $350/hour for Weinger, $195/hour for Tetzeli, and $175/hour for associates, the trial court awarded $250, $175, and $125 per hour respectively. The court provided no explanation for this reduction. Pet.App. B 7, 9-11.

Second, as to the number of hours worked, the trial court rejected the defendants' line-by-line objections, stating: "[T]he Court finds the Defendant's assertions to be insufficient as a basis for a finding that the work was reasonable or to defeat the sworn assertions by the attorneys that the hours were necessary." Pet.App. B 8.

The court applied the reduced hourly rates to the plaintiffs' hourly breakdown to reach a sub-lodestar for each billing lawyer. It then added the sub-lodestars to get a composite figure, which it enhanced by a factor of 2. *Id.* at 9-11.

The trial court justified awarding a 2.0 multiplier primarily "because this is a rare and exceptional case where an upward adjustment of the lodestar is appropriate due to exceptional success" and "groundbreaking results." Pet.App. B 9. The court cited a number of other reasons. Altogether, the district court's reasons for awarding an enhancement fell into six general categories: (1) the result obtained was excellent, (2) the case was novel, (3) it was complex, (4) it was lengthy, (5) the plaintiffs' attorneys were skillful, and (6) other counsel was unavailable and the case was undesirable. Pet.App. B at 8-9.

The district court did not require the respondents to demonstrate that the lodestar yielded an unreasonable fee, nor did it find the lodestar amount unreasonable. Further, the court failed to find that the factors used to enhance the lodestar were not already included in it or that an enhancement was necessary to obtain a reasonable fee.

The trial court made no appellate fee lodestar determination. It failed to fix hourly rates for appellate work or determine the reasonable number of hours expended. Pet. App. 11. Nonetheless, it awarded $85,304.50 in appellate fees. This number happens to be the amount of fees requested without application of a 2.0 multiplier. Pet.App. B 11.

Altogether, the trial court awarded fees as follows:

Type	Hours	Rate	Lodestar	With 2.0 Multiplier
Initial Fee Petition				
Sr. Partner	736.8	$250.00	$184,200.00	$368,400.00
Jr. Partner	107.4	$175.00	$18,795.00	$37,590.00
Associate	349.3	$125.00	$43,662.50	$87,325.00
Total	1193.5		$246,657.50	$493,315.00
Supplemental Fee Petition				
Sr. Partner	81.6	$250.00	$20,400.00	$40,800.00
Jr. Partner	51	$175.00	$8,925.00	$17,850.00
Associate	50.4	$125.00	$6,300.00	$12,600.00
Total	183		$35,625.00	$71,250.00
Fees on the Merits Appeal				
Sr. Partner	??	??	??	
Jr. Partner	??	??	??	

Type	Hours	Rate	Lodestar	With 2.0 Multiplier
Associate	??	??	??	
Total Appellate Fees			$85,304.50	
		Total Lodestar	$367,587.00	
Total Fee Award				$649,869.50

The circuit court affirmed without opinion. Pet.App. A. (It is not unusual for a circuit court to dispose of an attorneys' fee case without a written opinion. In fact, this court has granted review in two such cases, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); and *Blum v. Stenson*, 465 U.S. 886, 889 (1984)).

REASONS FOR GRANTING THE PETITION

This Court has laid down specific guidelines for awarding enhancements to the attorneys' fee lodestar. Despite this specific guidance, the treatment of fee enhancements by the courts of appeals has not been consistent either with this Court's directives or with each other. Lodestar enhancements have been capriciously awarded by several courts of appeals in a variety of circumstances without paying heed to this Court's instructions for the need for specific facts in the record that the lodestar amount yield an unreasonable fee or that a given enhancement is necessary to obtain a reasonable fee (as happened in this case). Other courts of appeals, on the other hand, have followed the Court's instructions.

The substantial amounts of money involved in attorneys' fee litigation — multiplied by enhancements — threaten the fiscal integrity of public programs, because unreasonably high fee awards can result in less money available for public services.

Because the courts of appeal use inconsistent standards and methods in determining fee enhancements, such awards are capricious and inconsistent. The failure to apply clear, objective standards to such awards encourages the parties to litigate fee disputes. This fee litigation unnecessarily increases the judiciary's workload. What should be a process that is relatively easy to administer instead often becomes a "second major litigation."

This Court should revisit the question of fee enhancements once more to bring order, objectivity, and regularity to a process that is too often chaotic and unreasonable.

I. THE ORDERS BELOW CONFLICT WITH DECISIONS OF THIS COURT.

This Court's decisions leave no doubt that it is the truly rare case that may command a fee multiplier. The lodestar is presumed to yield a reasonable fee. The fee petitioner has the burden of demonstrating the lodestar fee is unreasonable and enhancement is necessary to reach a reasonable fee. Such a showing must be supported by specific evidence in the record, and the courts must make specific, detailed findings why the lodestar is unreasonable and why the requested enhancements are necessary. The decisions below fail to meet the standards this Court has set for enhancement of the lodestar amount.

This Court's body of law dealing with attorneys' fee enhancements or "multipliers" is well developed. The first case to deal with the topic is *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Hensley* is a "partial success" case, meaning that the plaintiffs succeeded on some, but not all, of their claims. When the plaintiffs petitioned for fees, they requested an enhancement ranging from 30-50 percent. The district court refused the enhancement. The issue was how to calculate an appropriate, reasonable fee when an attorney's work in the case may not have contributed to the result. This Court focused on the relationship that existed between the "results obtained" — the

degree of success achieved in the litigation — and an award of attorneys' fees. *Id.* at 432. The district court's paramount task is to determine a reasonable fee. *Id.* at 433. The "most useful starting point" for determining the reasonable fee is to calculate the product of "reasonable hours" times "a reasonably hourly rate." *Id.* "This calculation provides an objective basis on which to make an initial estimate of the value of an attorney's services." *Id.* This product is the "lodestar."

Determination of lodestar, however, "does not end the inquiry." *Id.* at 434. Other considerations "may lead the district court to adjust the fee upward or downward." *Id.* In a partial success case "the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436. Thus, the lodestar may yield an unreasonable fee.

The Court elaborated on the *Hensley* principles in *Blum v. Stenson*, 465 U.S. 886 (1984). *Blum* reaffirmed that the first step in an attorneys' fee analysis is determination of the lodestar. *Id.* at 888. While this Court termed the lodestar an "estimate" that might be subject to modification "as necessary," *id.*, it emphasized that the lodestar was far more than a "rough guess." *Id.* at 897. In fact, the Court held that the lodestar was "presumed to be the reasonable fee." *Id.*

Because the lodestar is presumed to be the reasonable fee, the *Blum* court went on to discuss when modifications — upward or downward — are justified to that figure. The district court had enhanced the lodestar 50 percent "because of the quality of representation, the complexity of the issues, the riskiness of success, and the 'great benefit to the large class' that was achieved." *Id.* at 891. But this Court rejected these justifications for enhancement one after another on the ground that they are all subsumed into either the hourly rate or the number of hours worked. *Id.* at 898-900. Thus, novelty, complexity of the issues, and the skill of counsel "should be reflected in the reasonableness of the hourly rates." *Id.* at 898. The quality of representation also is reflected in the hourly rate.

Id. at 899. The benefit to the class as well "generally will be subsumed within other factors used to calculate a reasonable fee [so] it normally should not provide an independent basis for increasing a fee award." *Id.* at 900. Moreover, the Court observed that the district court had failed to "explain . . . exactly how this determination affected the fee award." *Id.* at 899. Last, the Court concluded that the plaintiffs had failed to show by specific evidence in the record that the contingency of the risk of loss justified the fee enhancement. *Id.* at 901.

The *Blum* court made clear that the burden of demonstrating the need for an enhancement lay with the fee petitioner who must offer "evidence that enhancement was necessary to provide fair and reasonable compensation." *Id.* at 901. Like no other case from this Court, *Blum* sets the standard: the presumptive reasonableness of the lodestar, the burden to demonstrate how the lodestar is unreasonable and why a particular enhancement is necessary to obtain a reasonable fee. *Blum* also imposes an obligation on the district court to make specific findings about the inadequacy of the lodestar and the need for a particular enhancement.

The *Blum* court also rejected the practice of routinely awarding a fee enhancement because of "results obtained." This factor "generally will be subsumed within other factors used to calculate a reasonable fee." *Id.* at 900. The number of people benefitted is also not a significant factor in determining the fee award. *Id.* at 900 n. 16.

Blum is not the last word on enhancements. Because of recurring confusion among the courts of appeals, this Court has revisited the question of when enhancements are appropriate. In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), the Court reaffirmed that the lodestar is presumptively reasonable. *Id.* at 564. This presumption is a strong one. *Id.* at 565. The Court rejected the fee applicant's claim that the quality of their attorneys' representation by itself supported a fee enhancement: "the lodestar figure includes most, if not all, of the relevant factors constituting a

'reasonable' attorney's fee . . ." *Id.* at 566. Because attorney skill is already accounted for in the lodestar, a fee enhancement for that reason is "double counting." *Id.* at 566. While the Court did not rule out the possibility of upward enhancements, it emphasized that "such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' in the record and detailed findings by the lower courts." *Id.* at 565.

A year later, the *Delaware Valley* attorneys' fee dispute returned to this Court for consideration of whether a fee could be enhanced because of contingency risk, *Delaware Valley II*, *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 483 U.S. 711 (1987). A plurality of the Court held that it could not, as this factor was subsumed by the lodestar. *Id.* at 727-731. The underlying teachings of *Blum* guided the thinking of the plurality. The Court reemphasized that the presumptive reasonableness of the lodestar limited enhancements to exceptional or rare cases "where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728. Moreover, as a general rule, any enhancement should not exceed one-third. *Id.* at 720. "Any additional enhancement would require the most exacting justification." *Id.*

The notion that contingency risk does not support an enhancement gained majority support in *City of Burlington v. Dague*, 505 U.S. 557 (1992). Citing *Blum*, this Court held that the fee applicant has the burden of showing that "'such an adjustment is *necessary* to the determination of a reasonable fee.'" *Id.* at 562 (emphasis the Court's).

In sum, the Court's decisions make it clear that the lodestar amount is a presumptively reasonable fee. The fee applicant can overcome this presumption only with specific evidence showing that the lodestar amount is unreasonable. The applicant must demonstrate that the requested basis for enhancement is not otherwise subsumed by the lodestar and is necessary to make the fee reasonable. The district and circuit courts must make

specific findings on these factual matters. Only then does a case become sufficiently "rare" or "exceptional" as to warrant a fee enhancement. Finally, if the court believes that an enhancement of more than one-third the lodestar is warranted, the "most exacting justifications" are required, which in turn require specific judicial fact finding.

Here, the district court required far less of the fee applicant than this Court demands. It failed to require the applicant to show that the lodestar resulted in an unreasonably low fee or to make findings to that effect. It failed to require the applicant to demonstrate why enhancement factors were not already subsumed in the lodestar and why enhancement was necessary to obtain a reasonable fee. It further failed to make the specific findings this Court requires. The district court failed to articulate why the amount awarded constituted a reasonable fee. Moreover, the multiplier selected to reach the amount awarded was far higher than at least a plurality of this Court has been willing to accept without detailed justification. Finally, the district court enhanced the lodestar for reasons that this court has said are generally subsumed by the lodestar.

In order to ensure that this Court's policy of sharply limiting fee enhancements and requiring strict proof of their need is heeded by the lower courts, the Court should grant the writ and spell out in precise terms the precise analytical steps required before granting a fee enhancement.

II. THE COURTS OF APPEALS VARY WIDELY ON THE DEGREE OF PROOF AND THE JUDICIAL FINDINGS REQUIRED TO JUSTIFY ATTORNEYS' FEE ENHANCEMENTS.

The district court failed to determine that the lodestar was inadequate or to justify the enhancement according to the standards set by this Court. The circuit court affirmed without

opinion. The effect of such an affirmance was to adopt the opinion of the trial court as that of the circuit court.

Other circuits engage in much more rigorous review. In *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 789 F.2d 1348 (9th Cir. 1986), the district court awarded a fee multiplier for the plaintiffs' degree of success in the lawsuit and the contingency of the recovery. *Id.* at 1353. Guided by this Court's opinion in *Blum v. Stenson*, the Ninth Circuit panel rejected the contention that success alone was enough to support a fee enhancement. *Id.* Success is subsumed by the lodestar. *Id.* "Many clients with reasonable bargaining power would insist upon paying no more. We do not think the State of Arizona should be required to shoulder a greater burden." *Id.* The court rejected the claim that risk contingency warranted a multiplier in large part because "there is no evidence in the record that the representation actually posed a substantial risk to the law firm's business or that any risk presented was not adequately taken into consideration in setting the hourly rate." *Id.* at 1354. The court said that *Blum* precluded the use of a multiplier "unless the successful plaintiff has demonstrated that the lodestar amount does not represent a fully compensatory fee. The plaintiffs in this case have made no such showing . . ." *Id.*

The Ninth Circuit reaffirmed these principles in *Van Gerwen v. Guarantee Mutual Life Co.*, 214 F.3d 1041, 1046-1047 (9th Cir. 2000) (vacation of downward adjustment of .75 and remand when district court failed to find that the lodestar amount was unreasonable or explain why the hourly rate did not fully account for the quality of representation). See also *Odima v. Western Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1994) (error to award 50 percent enhancement when there was insufficient evidence in the record that the lodestar failed to yield a reasonable fee).

The Seventh Circuit's handling of enhancements is also at odds with the analysis in this case. In *In re UNR Industries*, 986 F.2d 207 (7th Cir. 1993), the question was payment of a

bankruptcy trustee's fees. The circuit court held that a lodestar approach was preferable to a common fund approach often used in bankruptcy matters, and that no enhancement was warranted. The court said, "such enhancements are not proper when the compensation awarded is reasonable." *Id.* at 211.

The Fifth Circuit's approach mirrors that used in the Ninth and Seventh circuits. In *Cooper v. Pentecost*, 77 F.3d 829 (5th Cir. 1996), the plaintiffs sought a $5 enhancement in their hourly rate and then a 2.0 enhancement as punishment for failure to comply with a consent decree. The circuit court held that no enhancement was warranted, relying on the principle that it "is appropriate for a court to enhance the lodestar amount only in certain exceptional cases where the prevailing party demonstrates that the enhancement is necessary to make the lodestar reasonable." *Id.* at 833. The *Cooper* district court found it had no authority to enhance the lodestar and the circuit court affirmed. *Id.* at 834. *See also Watkins v. Fordice*, 7 F.3d 453, 459 (5th Cir. 1993).

The Eighth Circuit in *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir. 1991), also rejected a 25 percent enhancement because of the fee applicant's failure to demonstrate factually why "an enhancement based on exceptional results was necessary to provide counsel with a reasonable fee." *Id.* at 162. Unlike the courts below in this case, the Eighth Circuit emphasized that enhancements "must be supported by specific evidence in the record and detailed findings by the lower court." *Id.*

Other circuits have ignored or skirted the requirement for specific facts in the record to justify an enhancement, for a finding that the lodestar is inadequate and for findings as to why a particular factor would make for an enhanced, reasonable fee. See *Hyatt v. Apfel*, 195 F.3d 188, 191-192 (4th Cir. 1999) (1.33 multiplier upheld without required findings); *In re Miniscribe Corp.*, 309 F.3d 1234, 1246 (10th Cir. 2002) (2.57 multiplier approved without findings).

In *Paschal v. Flagstar Bank, FSB*, 297 F.3d 431 (6th Cir. 2002), the circuit court approved a 50 percent enhancement where the district court had concluded only that the hourly rate awarded was "modest." The rate was below market, which could lead one to conclude the lodestar was unreasonable. But the district and circuit courts never went so far as to conclude the lodestar was inadequate. Nor did the circuit court require the district court to analyze why and how a given factor produced a reasonable fee.

The Eighth Circuit also approved a fee enhancement when the lodestar was "modest" without any specific evidence or finding that the amount was unreasonable. *Daggitt v. UFCW, Local 304A*, 245 F.3d 981, 990 (8th Cir. 2001) (25 percent enhancement approved).

In sum, there is little uniformity — and much caprice — both in the courts' analytical approach and in the amount of modifiers awarded. They can range from 25 percent to more than 2.57 times without any meaningful explanation of how or why the amount of the enhancement is necessary to achieve a reasonable fee. The courts of appeals' inconsistent approaches should not be allowed to continue.

III. THE AWARD OF FEE ENHANCEMENTS AGAINST PUBLIC BODIES ACCORDING TO UNCERTAIN CRITERIA PRESENTS AN IMPORTANT PUBLIC ISSUE.

The impact of attorneys' fee awards on public bodies is no trivial matter. The amounts awarded can be substantial, ranging into the millions of dollars per case. *See e.g.*, Deavel, *Birmingham's Employment Discrimination War*, 38 A.F.L.Rev. 197 (1994) ($2.5 million fee in Title VII case). In fact, fee awards — granted by Congress with the best of intentions to prevailing plaintiffs in fee shifting cases — can actually *reduce* funds available for public services. *See e.g.*, Andrews, *The*

Third Alternative: An Alternative to Race Consciousness and Color Blindness in Post-Slavery America, 54 Ala.L.Rev. 483, 526 (2003). Thus, improperly imposed fee enhancements, which substantially inflate fee awards, threaten the financial stability of public programs and services and could result in diminished public services for all.

The fee lodestar has been criticized for producing inconsistent results which have "damaged the objectivity and predictability of fee awards." Lamb, *The Lodestar Process of Determining Attorneys' Fees: A Guiding Light or Black Hole?*, 27 J.Leg.Pro. 203, 207 (2003). However, this "problem is also exacerbated by the inconsistent use of multipliers. These multipliers range anywhere from zero to four, producing wildly varying results." *Id.*

One factor relied on by the district court in this case to justify the multiplier, that other counsel were unavailable and the plaintiffs were unpopular, necessitates inquiry into community attitudes and local supply-and-demand of counsel. Substantial differences as to those facts are nearly inevitable, coloring the outcome and potentially producing bitter divisions. *See e.g.*, majority opinion and dissent in *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996).

The other factors relied on by the district court in this case to enhance the fee will never produce consistent results. The degree of success, the novelty of the issues, the complexity of the case, and the skill of the plaintiffs' lawyer can be used to justify any outcome and are not appropriate when a court awards compensation for every hour reasonably spent on the case. The failure of courts to apply uniform fee standards frustrates this Court's objective of preventing fee disputes from exploding into complex, time-consuming secondary litigation. *Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation."); Muir, *Analysis of the Valuation of Attorney Work Product According to the Market for Claims: Reformulating the Lodestar Method*, 31

Loy.U.Chi.L.J. 599, 615 (2000) ("federal courts do not apply the lodestar method uniformly. The resulting chaotic state of law fosters an excessive amount of litigation concerning the proper fee amount.").

Capriciously imposed fee enhancements endanger both the public treasury and public confidence in the judicial process. If enhancements are justified at all, they must be based on clearly articulated, not arbitrary, standards and on facts specifically set out in the record.

CONCLUSION

For these reasons, the Court should grant the petition.

RESPECTFULLY SUBMITTED,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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Counsel for Petitioners

Dated April 14, 2004

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2004

JERRY REGIER, et al.,

Petitioners,

v.

DOES 1-13, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' APPENDIX

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-12117

D.C. Docket No. 92-00589-CV-ASG

JOHN/JANE DOE, 1-13 by and
through Mr/Mrs. Doe Sr. No.'s
1-13 as natural guardians on behalf of
John/Jane Doe 1-13 and on behalf of those
similarly situated,
FLORIDA ASSOCIATION OF
REHABILITATION FACILITIES
INCORPORATED, a Not-for-Profit
association,
UNITED CEREBRAL PALSEY OF
FLORIDA, INCORPORATED, a Florida
Not-for-Profit Corporation,

Plaintiffs-Appellees

versus

JEB BUSH, in his official capacity
as Governor of the State of Florida

ROBERT WILLIAMS, individually
and in his official capacity as Secretary
of the Department of Health and Rehabilitative
Services of the State of Florida,
GARY CLARKE, individually and
in his official capacity as Assistant
Secretary for Medicaid, Department of
Health & Rehabilitative Services
of the State of Florida,
CHARLES KIMBER, Assistant Secretary
of Developmental Services
SECRETARY OF HEALTH AND HUMAN
SERVICES, Edward A. Feaver,
in his official capacity,

Defendants-Appellants,

RICHARD LEPORE, in his
official capacity as Assistant
Secretary for Developmental Services
of the Department of Health &
Rehabilitative Services, State of Florida

Defendant,

BRETT CRAMER, by his father
and next friend, Cyrus Cramer,
DANTON DAVIS SMITH, by his legal
guardian Marion Smith,
ADVOCACY CENTER FOR PERSONS
WITH DISABILITIES, INC.

Consolidated Plaintiffs.

Appeal from the United States District Court
for the Southern District of Florida

(January 16, 2004)

Before WILSON and KRAVITCH, Circuit Judges, and GOLDBERG*, Judge.

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*Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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[1] 11th Circuit R. 36.1 provides:
When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law;
and an opinion would have no precedential value, the

judgment or order may be affirmed or enforced without opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHN/JANE DOE 1-13 by and through M./Mrs. Doe Sr. No's1-13 as natural guardians on behalf of John/Jane Doe 1-13 and on behalf of those similarly situated, FLORIDA ASSOCIATION OF REHABILITATION FACILITIES INCORPORATED, a Not-for-Profit association, UNITED CEREBRAL PALSY OF FLORIDA, INCORPORATED, a Florida Not-for-Profit Corporation,

Plaintiffs,

vs. Case No. 92-589-CIV-FERGUSON

JEB BUSH, in his official capacity as Governor of the State of Florida, JERRY REGIER, in his official capacity as Secretary of the Department of Children and Family Services, et al.

Defendants.
_____/

ORDER VACATING FEBRUARY 7, 2002 ORDER ON FEES AND COSTS AND CORRECTED ORDER ON PLAINTIFFS' MOTIONS TO AMEND ORDER ON ATTORNEYS' FEES AND COSTS

THIS CAUSE is before the Court on the Plaintiffs' Motion for Attorneys' Fees and Costs [D.E. 452], Plaintiffs' Supplemental Claim for Attorneys' Fees and Costs [D.E. 537] and Plaintiffs' Motion to Clarify or for Re-Hearing and/or Relief from Order and/or Judgment on Attorneys' Fees and Costs [D.E. 617].

Factual Background

This litigation commenced ten years ago as the first in a series of lawsuits on behalf of developmentally disabled individuals. In 1996 a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants. That judgment was affirmed. *See Doe v. Chiles*, 136 F.3rd 709 (11th Cir. 1998). Several years later the Plaintiffs filed a motion for contempt alleging that the Defendants had not placed the Plaintiffs in intermediate health care facilities as ordered and had not taken steps to comply with the final judgment. Indeed in the course of the litigation some of the Plaintiffs died. After a three day show cause hearing this Court held the Defendants in contempt by an order entered on October 7, 1999 and fined them $10,000 a day until commencement of acts showing compliance. The Defendants appealed.

In August, 2001 the Court of Appeals reversed the contempt order holding that the original injunction was too lacking in specificity and remanded for further proceedings. At a status conference held on January 25, 2002 counsel for the Plaintiffs answered in the affirmative when questioned whether he was abandoning the contempt motion. Obviously the Plaintiffs are content, for now, that the Defendants will comply with the judgment. This Court then entered an Order on February 7, 2002 on Plaintiffs' Motion for Attorneys' Fees and Costs, the order being reconsidered here.

Discussion

Having duly considered the motions, pertinent portions of the record it is ORDERED AND ADJUDGED that the Order

on Plaintiffs' Motions for Attorneys' Fees and Costs[D.E. 616] dated February 7, 2002 is VACATED.

THE FIRST APPLICATION FOR FEES

The Lodestar Amount

To determine an award of attorney's fees the Court must multiply the number of hours reasonably expended by a reasonable hourly rate. A reasonable hourly rate is determined by "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988) (*citing Blum v. Stenson*, 465 U.S. 886 (1984)).

The plaintiffs' senior attorney, Steven M. Weinger ("Weinger"), has submitted his affidavit, the affidavits of other attorneys and other supporting documentation in support of an hourly fee. Weinger contends that he should be paid at the hourly rate of $350.90, that the junior partner should be paid at the hourly rate of $195.00 and that the other associates should be paid at the hourly rate of $175.00. Defendant contends that the Plaintiffs' hourly rate are excessive and suggests an hourly rate range of $125.00 to $250.00; however in 1992 Defendant's counsel stated that they had "little doubt that a court would award Mr. Weinger, based on his experience, his usual fee of $250.00 if this matter is litigated."

To determine the hours reasonably expended the Court must exclude hours that are "unreasonable to bill a client and therefore to one's adversary irrespective of the skill, reputation or experience or counsel." *Id.* (citations omitted). The Court must also exclude "excessive, redundant or otherwise unnecessary" hours. *Id.* (citations omitted). Nevertheless, a "court cannot piecemeal deduct hours expended, without some indication that the work was unreasonable." *Allen v. Freeman*, 694 F. Supp 1554, 1555 (S.D. Fla. 1988) (*citing, Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1207 (11th Cir. 1983).

Defendant challenges the hours the Plaintiff claims to have expended contending that (1) the fee application is inadequately documented (2) the billing contains impermissible multiple listings under a single time entry and (3) the billing repeats identical activities without explaining differences between what was accomplished for each listing. The Defendant's challenge to the reliability of Plaintiffs' billing records are buttressed by line-by-line objections charts specifically disputing many time and cost entries. The Defendant characterizes the itemized billing records as demonstrating "insufficient detail," "lumping," "duplicative," and "excessive [as to the] amount of time spent on task." Having reviewed the objection charts, the Court finds the Defendant's assertions to be insufficient as the basis for a finding that the work was unreasonable or to defeat the sworn assertions by the attorneys that the hours were necessary. In the application for fees it is claimed that the total amount of hours Plaintiffs' attorneys' expended was 1376.5. This is a relatively low number considering that plaintiffs' attorneys accrued these hours pursuing complex litigation over a ten (10) year period.

Adjustment of the Lodestar

The Court is enhancing the lodestar fees for both the motion for attorneys' fees and the supplemental claim for attorneys' fees by a multiplier of a 2.0 because this is a rare and exceptional case where an upward adjustment of the lodestar is appropriate due to exceptional success. *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984) (recognizing an enhanced award of attorney's fees in cases of exceptional success); *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("in some cases of exceptional success an enhanced award may be justified")' *Loranger v. Stierheim*, 10 F.3d 776, 783 (1994) (declining to decide whether the case was a "rare and exceptional case where an upward adjustment of the lodestar is called for because of exceptional success"); *Allen v. Freeman*, 694 F. Supp. 1554, 1556 (1988) (court found enhancement of the loadstar amount appropriate because the results of the litigation were

exceptional). In enhancing the lodestar fee by a multiplier of 2.0 the Court has considered the complexity and novelty of the issues presented, the fact that fee attorneys have the ability or desire to represent plaintiffs of this type, the length of the litigation, and that the hours and time expended were taxing to counsel's small firm. The class of Plaintiffs in this case were developmentally disabled (i.e., mentally retarded) individuals who were claiming that the state acted unreasonably in denying or delaying the Plaintiffs access to immediate care facilities in violation of section 1396a(a)(8) and the Fifth and Fourteenth Amendments to the United States Constitution. The case was without significant precedent and the expert witnesses were outstanding in preparation for the hearings and in substantive knowledge of the highly specialized subject matter. Additionally, counsel's small law firm (approximately seven (7) members) was primarily responsible for the litigation and spent a decade representing these Plaintiffs in this hotly contested lawsuit.

Not only has the Court considered the above factors in enhancing the lodestar fee but has also considered the exceptional success and groundbreaking results achieved by the Plaintiffs in this case. In 1996 a judgment was entered for the Plaintiffs ordering state officials to provide institutional care for eligible applicants, some of whom had been waiting for many years without proper care. That judgment was affirmed on appeal by the Eleventh Circuit Court of Appeals in an opinion which painstakingly established the law to govern this case as well as several related cases which followed. *See Doe v. Chiles*, 136 F.3rd 709 (11th Cir. 1998).

Accordingly, the fee, including the lodestar and multiplier is calculated as follows:

TYPE	HOURS	RATE	LODESTAR	2.0X MULTIPLIER
Sr. Partner	736.8	$250.00	$184.200.00	$368,400.00

Jr. Partner	107.4	$175.00	$18,795.00	$37,590.00
Associates	349.3	$125.00	$43,662.50	$87,325.00
TOTAL	1193.5		$246,657.50	$493,315.00

It is further **ORDERED AND ADJUDGED** that Plaintiffs' Motion for Attorneys' Fees and Costs [D.E. 452] is **GRANTED IN PART AND DENIED IN PART**. Plaintiffs are awarded fees on the first application in the amount of $493,315.00.

SUPPLEMENTAL CLAIM FOR FEES

The Lodestar Amount

The Defendant has filed objections to Plaintiff' Supplemental Claim for Attorneys' Fees and Costs similar to those filed for the initial motion for attorneys' fees and costs. Again, the Defendant has included an itemized chart detailing objections to the hours billed using the same language as in the previous objections. The Court finds Defendant's assertions to be insufficient to defeat a finding that the work was reasonable or to defeat the sworn assertions by the attorneys that the hours were necessary.

The fee, including the lodestar and multiplier is calculated as follows:

TYPE	HOURS	RATE	LODESTAR	2.0X MULTIPLIER
Sr. Partner	81.60	$250.00	$20,400.00	$40,800.00
Jr. Partner	51.00	$175.00	$8,925.00	$17,850.00
Associates	50.40	$125.00	$6,300.00	$12,600.00
TOTAL	183.00		$35,625.00	$71,250.00

It is further **ORDERED AND ADJUDGED** that Plaintiffs' Supplemental Claim for Attorneys' Fees and Costs [D.E. 537] is **GRANTED IN PART AND DENIED IN PART.** Accordingly, Plaintiffs are awarded additional fees in the amount of $71,250.00

APPLICATION FOR APPELLATE FEES AND COSTS

In addition to the attorneys' fees requested previously, the Plaintiff has requested litigation costs and appellate fees and costs pursuant to the Eleventh Circuit Court of Appeals May 19, 1998 Mandate. Having reviewed the Order of the Court of Appeals, considered the motion, response, reply and heard the parties' oral argument, the Court awards $85,304.50 for Plaintiffs' appellate fees and costs.

Finally, the Plaintiff requests additional litigation costs in the amount of $27,091.61 for further proceedings in this Court. Defendants have filed another itemized chart detailing objections to the costs portion using the same language as in the previous objection that there is primarily "no showing of necessity." Having reviewed the application, the costs objection chart and memoranda of law, the objections are overruled. The Plaintiffs' are awarded additional litigation costs in the amount of $27,091.61.

Conclusion

It is further **ORDERED AND ADJUDGED** that the Plaintiffs' Motion to Clarify or for Rehearing and/or Relief from Order and/or Judgment on Attorneys' Fees and Costs [D.E. 617] is **GRANTED IN PART AND DENIED IN PART.**

The total amount of fees and costs awarded the Plaintiffs pursuant to the motions is $676,961.11.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 15th day of March, 2003.

s/

WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Steven M. Weinger, Esq.
W. Eugene Gandy, Jr., Esq.
Chesterfield smith, Jr., Esq.
Howard Talenfeld, Esq.
Jeffrey Ryner, Esq.
Stephanie Daniels, Esq., Esq.